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June 25, 1997

Ms. M--- D---
Certified Public Accountant
XX --- --- Parkway
--- ---, CA XXXXX-XXXX

Re: Delivery Charges
M--- & M---, Inc.
dba T--- Market
Account No. SR -- XX-XXXXXX

Dear Ms. D---:

This is in response to your letter of April 22, 1997 in which you inquire about the application of sales tax to separately stated delivery charges when delivery of the merchandise is made by facilities of the retailer.

As I understand the facts, your client M--- & M---, dba T--- Market (T---), is a grocer which, for an additional charge of \$3.50, will deliver groceries to its customers. You explain that the deliveries are made by a T--- vehicle and that the sales are not C.O.D., but are charged to the customer's account at the time the order for the merchandise is placed. It is your contention that, since T--- charges orders to the client's account at the time the order is made, the sale has occurred prior to the delivery of the merchandise.

As you know, the general rule is that retail sales of tangible personal property in California are subject to sales tax, measured by gross receipts, unless specifically exempted by statute. (Rev. & Tax. Code § 6051.) Sales and Use Tax Regulation 1628(b)(2) explains the circumstances under which transportation charge for deliveries by a retailer's facilities may be excluded from tax:

“[W]hen transportation is by facilities of the retailer or the property is sold for a delivered price, tax applies to charges for transportation to the purchaser, unless (A) the transportation charges are separately stated, (B) are for transportation from the retailer's place of business or other point from which shipment is made directly to the purchaser, and (C) the transportation occurs after the sale of the property is made to the purchaser. When the sale occurs before the transportation to the purchaser commences, the tax does not apply to separately stated charges for the transportation. The amount that may be excluded from the measure of the

tax cannot exceed a reasonable charge for transportation by facilities of the retailer or the cost of transportation by other than facilities of the retailer.”

It is your position that you have satisfied all of the requirements of Regulation 1628(b)(2)(A)-(C). From the evidence you have presented it appears that you have met the first two requirements by separately listing charges for delivery and by providing deliveries from your place of business directly to the purchaser or the purchaser's designee. It also appears that a charge of \$3.50 for the delivery of groceries is a reasonable charge for transportation. Since you deliver the property in your own facilities, the remaining issue is whether transportation to the purchaser occurs prior to the sale of the property to the purchaser. If not, the charges for delivery are not excludable from tax. (Rev. & Tax. Code § 6012, Reg. 1628(b)(2).)

Sales and Use Tax Regulation 1628(b)(3)(D) explains a sale takes place as follows:

“Unless explicitly agreed that title is to pass at a prior time, the sale occurs at the time and place at which the retailer completes his performance with reference to the physical delivery of the property, even though a document of title is to be delivered at a different time or place. If the contract requires or authorizes the retailer to send the property to the purchaser but does not require him to deliver it at destination, the retailer completes his performance with reference to the physical delivery of the property at the time and place of shipment, e.g. delivery of the property to a carrier for delivery by the carrier to the purchaser; but if the contract expressly requires delivery at destination, including cases where one of the terms of the contract is F.O.B. place of destination, the retailer completes his performance with reference to the physical delivery of the property on tender to the purchaser there. **When delivery of the property is by facilities of the retailer, title passes when the property is delivered to the purchaser at the destination unless there is an explicit written agreement executed prior to the delivery that title is to pass at some other time.**” (Emphasis added.)

This means that, unless T--- and its customers explicitly agree to pass title prior to delivery, title passes, and the sale occurs, at the time the groceries are delivered to the customers. (Reg. 1628(b)(3)(D).) You have not provided evidence of an explicit written agreement with your customers passing title prior to delivery. We, therefore, conclude that the sale occurs at the time T--- completes delivery. As such, T---’s charges for transportation are subject to sales tax and cannot be excluded from its gross receipts.

Regulation 1628 only applies to sales of products which are subject to the imposition of sales and use tax. Thus, under the facts as described, if an order delivered by T--- to its customer consists solely of food products, exempt from Taxation pursuant to Revenue and Taxation Code section 6359, the delivery charges would not be subject to sales and use. From the information you have provided it appears that the orders received from T---’s customers include combinations of taxable merchandise and exempt food products. Under these circumstances, and where title does not pass prior to delivery, the delivery charges should be prorated between taxable and non-taxable products with sales tax imposed upon the portion of

the delivery charges attributable to the products which are subject to sales tax. (Business Taxes Law Guide Annot. 557.0107 (1/25/94).) For example, if T--- delivers merchandise to its customers totaling \$15.00 consisting of \$10.00 exempt food products and \$5.00 taxable merchandise, one third of the delivery charges would be subject to sales tax.

If you have further questions, feel free to write again.

Sincerely,

Patricia Hart Jorgensen
Senior Tax Counsel

PHJ:rz

cc: --- --- District Administrator - --
Ms. Monique L. Everson, Return Analysis (MIC 35)